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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:

FAR WEST PUMP COMPANY,

Debtor.

In Proceedings Under Chapter 11

Case No. 4:17-bk-11112-BMW Chapter: 11

**DUNLAP OBJECTIONS TO
LEONARD AND TALWAR
APPLICATIONS TO SUE
SECURA INSURANCE**

Creditors Doug and Tina Dunlap and High Desert Irrigation (collectively, the “Dunlaps”) object to the applications by attorney/creditor David Leonard and attorney Rohit Talwar (Docs. 748-753) for retention to file a bad faith lawsuit against Debtor’s insurer, Secura Insurance Company (“Secura”). While a bad faith suit seems ill-advised for a number of reasons, Debtor should at least get a second opinion from independent counsel who were

1 not involved in the insurance claims in question, cannot be called as witnesses in a bad faith
2 case, and who are not themselves creditors in bankruptcy. For these and other reasons below,
3 the Dunlaps respectfully object to the retention of Messrs. Leonard and Talwar for the
4 purpose of filing a bad faith suit against Secura, without prejudice to Debtor getting a second
5 opinion from other counsel and filing a new retention request if appropriate at a later date.
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7 1. Debtor Far West Pump Company is the named insured on various commercial
8 insurance coverages issued by Secura. Exhibit 1 (Secura policy excerpts) at pages 1-2.

9 2. In November 2014, Debtor retained attorney David Leonard to pursue
10 insurance claims arising from the misconduct of former Far West Vice President Joel
11 Rodriguez while he was employed by Debtor. Exhibit 2 (Leonard engagement letter).
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13 3. In January 2015, Mr. Leonard filed suit against Rodriguez and advised Secura
14 of same. Exhibit 3 (Leonard memo to Secura). Mr. Leonard promised to hold any recoveries
15 in trust for Secura, apply same as appropriate and add Secura as a party to the lawsuit if
16 necessary to protect its subrogation rights. *Id.*
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18 4. Mr. Talwar was subsequently retained as counsel of record for Far West in the
19 Rodriguez case and helped Far West pursue its remaining insurance claims against Secura.

20 5. Secura paid some but not all of Debtor's insurance claims. The unpaid claims,
21 presently valued by Debtor at approximately \$137,000, are the subject of the proposed suit.
22 Debtor would also seek its attorneys' fees and costs in such a suit, and possibly punitive
23 damages as well, though such damages are difficult to recover under Arizona law.
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1 6. The Secura policy documents include a two-year time limit for an insured to
2 sue Secura, the same as the Arizona statute of limitations for bad faith claims. *See* Exhibit 1
3 (Secura policy excerpts) at pages 3-5 and A.R.S. § 12-542. Under the Secura policy, the time
4 limit is triggered by the date on which the loss occurred or the date the insured discovers the
5 loss, depending on the specific coverage in question. Exhibit 1 at pages 3 and 5.

7 7. As noted above, Debtor's insurance claims date back to 2014, and Debtor filed
8 the Rodriguez suit in early 2015. By then, Far West had already recovered approximately
9 \$725,000 in criminal restitution from Mr. Rodriguez, leaving an unpaid balance of about
10 \$125,000, as Mr. Leonard advised Secura in 2015. Exhibit 3.

11 8. The Debtor and Mr. Leonard went back and forth with Secura on the remaining
12 losses and insurance claims thereafter. By late 2017/early 2018, Far West owners Clark and
13 Channa Vaught were bitterly complaining to Secura about not having all of their claims paid.
14 "WE ARE NOT HAPPY!!! . . .WHERE IS THE MONEY!!!!!!", Channa Vaught wrote to
15 Secura in early 2018. Exhibit 4 (caps in original). At or around the same time, Clark Vaught
16 told Secura that Far West would file a bad faith suit if Secura did not pay all remaining claims
17 within 24 hours. Exhibit 5.

18 9. Given the age of the underlying losses, Debtor's insurance claims and the
19 Vaughts' threats to sue Secura, a bad faith suit would likely be met with a motion to dismiss
20 on timeliness/statute of limitations grounds. To survive such a motion, Debtor would have
21 to show that the time limit/statute of limitations was tolled for some reason recognized by the
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1 policy documents and/or applicable law. They would also need admissible evidence to
2 support a tolling argument, and the Vaughts would be subject to attack on credibility and
3 other grounds if they testify. The only other friendly witnesses for Debtor appear to be the
4 lawyers who handled their insurance claims.

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6 10. Mr. Leonard was the lawyer responsible for claims-related communications
7 with Secura from inception until his withdrawal just before bankruptcy, with Mr. Talwar
8 taking over thereafter. If Debtor tries to use the Leonard/Talwar communications to argue
9 that the time limit/statute of limitations was tolled (*e.g.*, that they reasonably believed Secura
10 was still considering their unpaid claims years later), that risks making the lawyers witnesses.
11 That would also be true if the Vaughts assert advice-of-counsel in trying to explain why they
12 did not pursue the bad faith suit they threatened years ago, and this assertion could also result
13 in the waiver of the attorney-client privilege between Debtor and Leonard/Talwar.
14 Regardless of the ultimate outcome on these issues, their mere presence could impair the
15 pursuit of any suit by these lawyers on Debtor's behalf.
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18 11. Mr. Leonard is himself a bankruptcy creditor, having asserted a claim for more
19 than \$400,000 in pre-petition fees against Far West, and he says he has a bad faith claim of
20 his own against Secura due to Debtor's assignment of policy proceeds to him in lieu of
21 payment for the same fees. *See* Doc. 751 at ¶ 7. Neither Debtor nor its attorneys explain how
22 they propose to resolve this conflict, whether Mr. Leonard intends to sue Secura himself, or
23 how they would apportion any additional recovery between them.
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1 12. Most insurers do not take kindly to being sued for bad faith and defend these
2 cases vigorously. A bad faith suit could cause Secura to take a fresh look at the insurance
3 claims made by Debtor and its recoveries from other sources to determine whether Debtor
4 kept its promise to hold any recoveries in trust and apply them to covered losses, and whether
5 Secura overpaid on these claims as a result. The odds Secura would pay any insurance claims
6 that remain open would also drop to near-zero once they got sued for bad faith.
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8 13. Secura would also be entitled to seek its attorneys' fees and costs in defending
9 such a suit, exposing the estate to a substantial fee/cost award, particularly given Debtor's
10 track record of contentious litigation tactics, serial continuances and constant delays. Given
11 this history and the case management problems caused by COVID-19, it is unlikely that a
12 newly-filed bad faith case would result in a trial date before 2022. In the meantime, Debtor
13 would also be responsible for paying its own court costs and litigation expenses on an ongoing
14 basis; *e.g.*, filing fees, expert witness fees, deposition charges and other out-of-pocket costs.
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16 14. Even if a bad faith suit resulted in a net recovery, it is not entirely clear how it
17 would be shared with the attorneys. Debtor reached a settlement with Mr. Leonard to give
18 him a 50-50 split of additional insurance proceeds up to \$200,000 against his prior fee claim.
19 Doc. 487. Debtor's papers say the proposed "contingency fee only applies to the recovery
20 for the Debtor and not to the insurance proceeds assigned to Mr. Leonard." Doc. 751 at ¶ 8.
21 Yet Debtor intends to sue for the same insurance monies as part of a "bad faith breach of
22 contract" action, including pursuit of "policy contract claims against Secura." *Id.* at ¶ 5.
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1 15. Debtor and counsel propose that Messrs. Leonard and Talwar collectively be
2 paid a 40-50% contingent fee for the bad faith suit. *See* Doc. 751 at ¶ 8. Since they already
3 billed and collected in some form for their work in pursuing the subject insurance claims,
4 however, how is an additional 40-50% contingent fee for a suit by the same lawyers based on
5 the same claims reasonable? Respectfully, it is not.
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7 16. To our knowledge, Debtor never listed a bad faith suit against Secura as a
8 potential asset until the recent Leonard/Talwar applications. Now they ask the Court and
9 creditors to hurry to approve their retention so they can file suit immediately -- even though
10 they apparently believe a final letter from Secura one year ago triggers the two-year time limit
11 for a bad faith suit. *See* Doc. 751 at ¶ 5(a). If they are right, then Debtor still has another
12 year to sue for bad faith and arguably longer for breach of contract under the six-year statute
13 of limitations. A.R.S. § 12-548. If they are wrong, and any suit is already time-barred, there
14 is no harm in taking a little more time to study all of this carefully.
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16 17. Rather than racing to allow Debtor to file yet another lawsuit, we respectfully
17 suggest that Debtor secure a second opinion from independent counsel who do not face the
18 same issues as Messrs. Leonard and Talwar. For example, Debtor used the Schmidt, Sethi
19 firm in an unrelated insurance bad faith case that recently settled on favorable terms. This or
20 any similar firm can be trusted to assess the merits, risks and benefits of a suit against Secura,
21 propose a reasonable contingent fee and estimate the expenses the estate would incur.
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